


Office of
The City Attorney
City of San Diego

MEMORANDUM

533-5800

DATE: December 12, 2006

TO: Honorable Mayor and City Council

FROM: Thomas Zeleny, Deputy City Attorney 

SUBJECT: Proposed procedures for receiving and tabulating protests against increases to water and sewer rates under Proposition 218

INTRODUCTION

The City is preparing to raise water and sewer rates according to the notice and hearing procedures required by Proposition 218, the "Right to Vote on Taxes Act." That measure, adopted by California voters in 1996, requires the City to give 45 days notice, conduct a public hearing, and provide an opportunity for written protests, before imposing or increasing rates for water, sewer and trash service. Proposition 218 and its implementing statute, the Proposition 218 Omnibus Implementation Act of 1997, provide very little guidance as to who is allowed to file protests, how protests are to be submitted to the City and how the City is to count them. Accordingly, the City Attorney, in consultation with outside counsel, recommends the City Council adopt the attached resolution to fill in these gaps in the law. These rules are reasonable, and consistent with the requirements of Proposition 218 and its implementing statute. Provided they are adopted before notice of the hearing is given, we can expect a Court to defer to these rules.

DISCUSSION

The only guidance provided by Proposition 218 regarding a majority protest hearing on a "property related fee" such as fees for water, sewer, and trash service is as follows:

"Sec. 6. Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each

parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. *At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.*

Article XIII D, § 6(a) of the California Constitution (emphasis added).

The proposed procedures for the submittal of protests and the tabulation of protests are divided into two sections – one regarding the submittal of protests and the other regarding tabulation. The balance of this memorandum comments on the proposed procedures.

A. Submittal of Protests.

1. The duty to notify property owners is plainly stated in Article XIII D, § 6(a)(1). It is unclear whether notice to utility customers who do not own property (tenants) is required, but Proposition 218 can be interpreted to require this and, until the Legislature provides guidance, we recommend that notice be given to customers as well as property owners.

2. Protests must be in writing, signed by a property owner or record customer, and received by the City Clerk prior to the close of the public hearing on the fees.

3. A valid protest must identify the property for which it is cast so the City can determine if protests have been received on behalf of a majority of the properties served by the City, as Proposition 218 requires. Email protests cannot be accepted because of the requirement for a signature. This also avoids the problems of verifying the validity of a protest when: a) an email is sent on behalf of a property owner without his or her consent or b) one person sends multiple emails purporting to represent several property owners. Oral protests cannot be counted because Proposition 218 requires them to be in writing.

4. The standard for a majority protest required by Proposition 218 is “a majority of the owners of identified parcels” which we interpret to mean the owners of a majority of the parcels – in other words, one parcel, one vote. It would not be a rational interpretation of the law to give more “votes” to a property with multiple owners or tenant customers. To allow tenant customers and landlord property owners to each have a voice in the matter, the proposed procedures provide that either may protest the fees. It is not practical to divide a protest among

the customers and owners of a common property. Accordingly, these procedures allow either the owner or a tenant customer to register a protest with respect to a property.

5. Protests may be withdrawn before the close of the hearing. However, only the person who filed the protest may withdraw it. The withdrawal notice must be in writing, identify the protest to be withdrawn by the property and must be signed by the person who filed the protest.

6. Traditionally, protests of government revenue measures are public records from the moment the City receives them. However, Proposition 218 creates election-like expectations with respect to assessment and fee proceedings. Although the Legislature has provided no guidance for the treatment of fee protests, it has declared that assessment ballots are confidential until they are tabulated and public records thereafter. This strikes a balance between protecting property owners from electioneering and ensuring transparency and accountability with respect to the tabulation of assessment ballots. We recommend following these assessment rules in the fee protest context because the policy considerations are similar and a court can be expected to defer to policy choices of the Legislature on a closely-related subject.

B. Tabulation of Protests.

1. The procedures task the City Clerk with tabulation of the protests. A valid protest must identify a property subject to the fee in question, be signed by a property owner or customer, state its opposition to the fee in question, be received before the close of the hearing, and not be withdrawn by the person who submitted it.

2. The Clerk's decision is final, although the Clerk's decision is subject to judicial review. We believe the cost and delay of an internal appeal of these decisions would not be justified. The City Council does, of course, retain the power to determine whether or not to proceed with a fee increase where the Clerk concludes that a majority protest has not occurred.

3. Depending on the apparent number of protests received, the City Clerk may begin tabulating protests after the close of the hearing. It may be impractical to do so sooner given that protests can be withdrawn. If the number of protests is obviously insufficient, there may be no need to examine and count them individually.

CONCLUSION

The City Council may adopt, amend, or take no action on these procedures. However, to give guidance to the public and to City staff regarding the conduct of the Proposition 218 "property related fee" protest proceeding, the City Attorney and outside counsel recommend some version of these procedures be adopted. Provided that the procedures remain reasonable and consistent with the requirements of Proposition 218 and its implementing statute, the City Council may alter the policy choices reflected in these procedures and summarized above.